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No. 00-1118

IN THE

Supreme Court of the United States

VINCENT RENZI, *et al.*,
Petitioners,

v.

CONNELLY SCHOOL OF THE HOLY CHILD, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

The decision in this case upholds an exemption from zoning laws that singles out for special advantage not religious schools, but *religious landowners*, specifically those who operate – or lease their property to others to operate – private schools of any kind on their property. As one academic commentator recently observed, in full agreement with our petition, the decision in this case is "[b]ased on strained reasoning and misreading of precedent," and "allows the state to endorse religious purposes – and landowners – over secular ones in violation of the Establishment Clause." *Recent Cases—Constitutional Law—Establishment Clause—Fourth Circuit Upholds Zoning Exemption for Religious Institutions*, 114 Harv. L. Rev. 932, 932 (2001).

Respondent urges the Court to deny review of this extraordinary decision, even though respondent does not dispute (i) that the petition raises recurring issues of substantial national importance; (ii) that these issues have generated significant controversy in the federal and state courts; or (iii) that the decisions of this Court have provided representative governmental bodies at all levels with very little guidance as to the kinds of statutory exemptions for religious practices and practitioners that will withstand constitutional scrutiny. Instead respondent labors to minimize – or avoid altogether – both the conflict between this Court's decisions and the decision below, and the various conflicts between and among the federal and state courts. Respondent even attempts to invoke the enactment of yet another congressional statute intended to "overrule" *Employment Division v. Smith*, 494 U.S. 872 (1990), suggesting contrary to logic that the statute could trump a conclusion by this Court that an exemption violates

the First Amendment's Establishment Clause. None of these arguments justify denial of the petition.[1]

1. Respondent begins by arguing that the majority opinion below does not conflict with any decisions of this Court. For this, respondent principally relies on the majority opinion's own announcement that it "plow[s] no new ground" in upholding the religion-specific exemption, Pet. App. 17a, *see* Resp. Br. 2, 19, and on the fact that the majority opinion accurately quotes the accommodation standard enunciated in *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 335 (1987), *see* Resp. Br. 7. Respondent contends that our disagreement is only "with the application by the court below of the test set forth in *Amos*, not with the test or approach adopted by the lower court." Resp. Br. 7. Respondent is wrong.

(a) It is of course hardly surprising that a lower court opinion would declare itself in accordance with this Court's precedents. But as the petition made very clear, the problem with the majority opinion is that despite its rote citation of *Amos*, the opinion makes no effort – none at all – to do what *Amos* and other precedents would require, *viz.*, explain how an exemption for any kind of private school on land owned or leased by a religious organization could be said to lift a significant burden on the religious practices of the *religious landowner*. Pet. 16. The opinion does recite the zoning burdens *religious schools* would have to bear in the absence of the exemption – and respondent dutifully repeats that recita-

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[1] Though respondent's insistence that it "has acted throughout with sensitivity to the concerns of its neighbors," Resp. Br. at 4, is ultimately immaterial to the question whether the Court should grant review, we note that all of the activities respondent cites in support of that assertion occurred only after respondent had rebuffed repeated efforts by neighbors to meet with respondent to discuss its plans, Ct. App. J.A. 729, and only after petitioners first initiated legal proceedings in 1997 to compel respondent to account for neighbors' concerns, *id.* at 553.

tion, Resp. Br. 3, 9 – but all of that is beside the point: the goal of alleviating burdens on religious schools simply cannot justify an exemption not even targeted specifically at such schools. *See Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 44 (1989) (Scalia, J., dissenting) (tax exemption in earlier case "applied to trade publications and sports magazines along with religious periodicals and sacred writings, and hence *could not be justified* as an accommodation of religion" (emphasis added)).

To justify the exemption's application to religious landowners, the majority opinion mints a new, *per se* rule that would sanction *any* exemption from generally applicable legal burdens so long as the "defining aspect" of the exemption is religion. Pet. App. 14a. That conclusion plainly conflicts not just with *Amos*, but with *Texas Monthly*, and every other religious-accommodation precedent of this Court. And though respondent relies heavily on the dissenting judge's statement that he "agree[s] with the analytical approach taken by the majority" in applying the *Amos* principle, Pet. App. 17a, what demonstrates the need for review – and what respondent therefore ignores – is the dissent's ultimate conclusion that the majority opinion in fact "*inappropriately expand[s]* the *Amos* principle, and, as a result, travel[s] down a path that will ultimately render the Establishment Clause meaningless," Pet. App. 18a (emphasis added).

(b) In struggling to avoid the inevitable conflict with *Amos*, respondent is forced to retreat to a misconceived – and mislabeled – "standing" argument based on part of the lower court's opinion. According to respondent, petitioners have no "standing" to challenge the exemption on the basis of a "hypothetical possibility that it might be applied in the case of a secular school." Resp. Br. 9; *see* Pet. App. 13a. Such a challenge, the lower court had reasoned, violates the "'traditional rule'" that "one 'to whom a statute may be constitutionally applied may not challenge the statute on the ground

that it may conceivably be applied unconstitutionally to others in situations not before the court.'" Pet. App. 13a (quoting *Los Angeles Police Dep't v. United Reported Pub'g Corp.*, 528 U.S. 32, 38 (1999)); *see* Resp. Br. 5, 9-13.

Respondent's "standing" argument is, with all due respect, frivolous. It is also wholly irrelevant to the lower court's holding. It is, in short, no barrier to review here.

In accordance with this Court's cases, petitioners below noted the statute's application to secular schools in order to establish that the statute, on its face, lacks the asserted "secular purpose" of accommodating the religious practices of religious schools. *See Santa Fe Ind. Sch. Dist. v. Doe*, 120 S. Ct. 2266, 2281 (2000) ("Our Establishment Clause cases involving facial challenges . . . have not focused on the possible applications of the statute, but rather on whether the statute has an unconstitutional purpose."). And, of course, "a court *must* invalidate a statute if it lacks 'a secular legislative purpose.'" *Id.* at 2282 (emphasis added). Thus the fact that the exemption on its face benefits not only respondent but also any religious landowner who leases its property to a secular educational entity, goes to show *not* that it could be applied unconstitutionally in *some other* cases, Pet. App. 13a, but that it is applied unconstitutionally in *every* case – including this one – because it lacks the secular purpose of accommodating the religious practices of religious schools.

Aside from reflecting an obvious category mistake, respondent's "standing" argument rests entirely on a part of the opinion below that is the purest form of dicta. In response to petitioners' argument below that the statute's overbroad facial application establishes the lack of a secular purpose, the majority made two separate arguments. The first was that petitioners could not rely on the fact that the exemption applies equally to secular schools on property owned by religious organizations, because their "standing derives from the status as neighbors challenging the particular improvements

and additions being constructed by the Connelly School, a religious school operated on property owned by a religious organization." Pet. App. 13a. As we have seen, that argument is no response at all on the issue of the exemption's secular purpose. For good reason, then, the court did not rest its analysis on that argument, but actually went on to address the implications of the statute's application in other contexts, and specifically held that the possibility of applications to secular schools does not render the statute unconstitutional. Pet. App. 13a-14a. Even though the exemption confers a commercial benefit on religious organizations that lease their property to secular entities for nonreligious educational instruction, the court held that the exemption is permissible simply because "religion is the defining aspect of the exemption." Pet. App. 14a. That conclusion, at bottom, is what sustains the exemption in the lower court's view. And the conflict between that conclusion and this Court's precedents is squarely presented by the lower court's opinion.[2]

2. Respondent next contends that there is no controversy in the lower courts demonstrating the need for review of this case. In the face of sharp and remarkably consistent divisions within the decided cases, respondent argues that the differences are simply matters of application, not principle, Resp. Br. 14, and that the divisions demonstrate only that "the issue was being carefully considered and debated before being resolved," Resp. Br. 13. Those arguments are incomplete, inaccurate and unpersuasive.

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[2] The dicta concerning other applications plainly is not an "alternative holding" that "bars consideration of [our] central complaint." Resp. Br. 19. Rather, as explained in the text, it is merely a subsidiary aspect of the court's reasoning as to why the statute has the permissible secular purpose of accommodating religion. It is therefore necessarily included within the scope of the central question presented here, *viz.*, whether the statute, on its face, violates the Establishment Clause because it cannot be justified as an accommodation of religion. *See* Pet. i.

(a) To begin with, respondent utterly ignores the split in the courts – and in the opinions of members of this Court – over whether the *Lemon* test has been modified in the religious accommodation context. *See* Pet. 21-23. That is indisputably a dispute over principle, and as the petition explains, it is a conflict exacerbated by the majority opinion below. *See id.* at 22; *see also Recent Cases*, *supra*, 114 Harv. L. Rev. at 934-35 ("In *Ehlers-Renzi*, the murky contours of the *Lemon* test allowed the majority to treat assistance as nonassistance in order to find that the government was not acting to establish religion."). Review would enable this Court to resolve the persistent conflict over *Lemon*'s application in this context.

(b) Respondent also ignores the related confusion wrought by the ambiguous suggestion in *Amos* that a religion-specific exemption is unconstitutional not if it simply "*allows* churches to advance religion," but rather only if "the *government itself* has advanced religion." *Amos*, 483 U.S. at 337. As the petition explained, both the majority opinion below and the California Supreme Court majority opinion in *East Bay Asian Local Dev. Corp. v. State*, 24 Cal.4th 693 (2000), interpreted that passage as authorizing the government to use exemptions to confer significant commercial advantages on religious organizations. *See* Pet. 26-27. As these courts see it, such benefits do not have the "effect" of advancing religion because any success the religious organization achieves, even with the benefit, comes ultimately from the persuasive power of its message and not directly from the benefit itself. *See id.*; *see also Recent Cases*, *supra*, 114 Harv. L. Rev. at 939 ("The *Ehlers-Renzi* court misapplied the second prong of the *Lemon* test by holding that the exemption for the zoning ordinance does not have the effect of impermissibly assisting religion. The court . . . extricated itself from claims that it was allowing the government to endorse religion by suggesting that it had not assisted religion, but had merely lifted a burden by allowing an exemption.

Such a reliance on act/omission rhetoric seems disingenuous."). The opportunity to correct that misimpression is reason enough to grant review.

(c) In respect to *other* issues raised by the petition that respondent does address, respondent suggests that those issues are settled enough to provide courts and other government actors clear guidance in resolving religious accommodation problems. The record refutes that suggestion.

Although respondent attempts to minimize the disagreements, the sharply split decisions of the four courts that have issued opinions in religious accommodation cases in the last year alone reflect the severity of the divisions over religious accommodation principles. Contrary to respondent's protestations, these are not just differences over applications to different facts. As with the split opinions below, it is no surprise that opinions on both sides of the issue would agree that the *Amos* standard "applies" in religious accommodation cases. The critical question, however, is what that standard *means*. Just as the dissent below concluded that the majority's purported "application" of *Amos* in fact altered the very nature of the *Amos* principle, so, too, do the divided opinions in other cases ultimately reflect fundamental disputes over the meaning and content of the *Amos* principle.

For instance, while respondent is correct that in *Children's Healthcare Is A Legal Duty, Inc. v. Min de Parle*, 212 F.3d 1084 (8th Cir. 2000), "[b]oth the majority and the dissent . . . applied *Amos*," Resp. Br. 15, respondent overlooks the dissent's conclusion that "the logic employed by the majority would allow nearly anything to be deemed a burden so as to permit an accommodation." 212 F.3d at 1106.[3] Even more striking is the divergence between the analytical approaches taken by the majority and two dissenting opinions

[3] A petition for certiorari was filed in *Children's Healthcare*, No. 00-914, on November 27, 2000. *See* 69 U.S.L.W. 3410 (Nov. 27, 2000).

in *East Bay*. *See* Pet. 19-20.[4] The majority opinion holds that even unproved, purely hypothetical burdens on religion suffice to justify religion-specific exemptions, *see id.* – a holding that respondent, notably, makes no effort to defend – whereas Justice Mosk's dissent, for example, proclaims that "[t]he majority's flawed approach could be used to justify exempting religious organizations from any law of general applicability," 24 Cal.4th at 724.[5] And the dissent in *Boyajian v. Gatzunis*, 212 F.3d 1 (1st Cir. 2000), while agreeing generally with the legal standards invoked by the majority, concludes that the majority applies those standards to uphold an exemption that "eschews neutrality to place religion in an exalted position," *id.* at 12, surely a constitutional objection to be taken seriously.[6]

3. Respondent's final argument against review rests on the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), a federal law recently enacted "in another attempt to overrule *Smith*." *Recent Cases*, *supra*, 114 Harv. L. Rev. at 938 n.42; *see* Resp. Br. 17. RLUIPA has nothing to do with this case, and provides no reason to delay resolution of the controversy over the constitutional issues raised here.

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[4] A petition for certiorari in *East Bay* is due March 21, 2001, and counsel for the plaintiffs has informed us they intend to file the petition.

[5] Respondent's assertion that Justice Mosk's dissent "was based on the California state constitution," Resp. Br. 16, is inaccurate: Justice Mosk expressly stated that his analysis applied equally to the federal Establishment Clause. 24 Cal.4th at 724 n.1.

[6] In noting that this Court denied certiorari in *Boyajian* on January 8, 2001, respondent fails to mention that, as explained in the petition, unlike in this case the exemption at issue in *Boyajian* was available to a wide array of secular and nonsecular groups, Pet. 19 n.7, which – as also explained in the petition – would likely render it constitutional under this Court's precedents, *id.* at 13-14. Thus, even though *Boyajian* opinions did invoke additional issues "largely similar to those presented here," *id.* at 19 n.7, the key fact necessary to resolve that case is not present here.

Respondent's reliance on RLUIPA reflects another simple category mistake. This case arises not under RLUIPA, but under the federal Constitution; the question is whether the Montgomery County zoning ordinance violates the First Amendment's Establishment Clause. Congress has no authority to answer that question by statute, and RLUIPA does not purport to provide any answer. Thus, even assuming respondent were correct that the exemption in this case is permissible under RLUIPA – and respondent is assuredly not correct[7] – any such statutory authorization could not trump a conclusion by this Court that the exemption violates the federal Constitution. The same would be true in any case raising an Establishment Clause challenge to a religious-accommodation exemption. In short, it would be literally impossible for this Court to adopt respondent's suggestion to delay "consideration of constitutional issues in this area" for their presentation "in the context of application of the Act." Resp. Br. 19. RLUIPA does not – and could not – present the constitutional issues raised in this case, and the Act in no way undermines the need to clarify the constitutional standards that govern legislative decisionmaking in this important area.

* * * *

In the end, respondent's own brief – in particular, its characterization of the divided opinions in this and other cases – amply confirms the need for review. The heart of respondent's argument is that there is no judicial controversy

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[7] Respondent states that RLUIPA "validates the reasoning" of the majority opinion in this case and "provides an independent basis for upholding the exemption at issue here." Resp. Br. 18. But RLUIPA only authorizes exemptions from laws that "substantially burden religious exercise," 42 U.S.C. § 2000cc-3(e), and there has never been a showing that the exemption here lifts a burden of any kind on the religious practices of the landowners whom it benefits. Thus, the exemption could not be upheld under RLUIPA any more than under this Court's cases.

worthy of clarification simply because opinions on both sides of the issue consistently invoke the statement in *Amos* that a religion-specific exemption, to be a permissible religious accommodation, must "alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions." *Amos*, 483 U.S. at 335; *see* Resp. Br. 7, 14-16. In point of fact, that only *identifies* the problem: the controlling precedents speak at too high a level of generality and have too few applications to provide concrete meaning, leaving lower courts with insufficient guidance for evaluating religious accommodation challenges – to say nothing (and respondent says nothing) of the inadequate guidance left for other government actors less schooled in applying ambiguous language from this Court's opinions. The predictable result is sharply split lower-court decisions, repeated requests for review by this Court, *see supra* notes 3, 4 & 6, and legislative uncertainty in an area already rife with the potential for community division.

It has been more than a decade since *Amos* and *Texas Monthly* were decided. Since then, this Court in *Smith* effectively withdrew the judiciary from the project of exempting private religious practices from generally applicable laws, leaving that burden squarely on the shoulders of the Nation's democratic decisionmakers. This is the ideal time for renewed guidance from this Court as to how our lawmakers may pursue the important objective of relieving religious groups of significant legal burdens on their religious practices without transgressing fundamental Establishment Clause principles.

CONCLUSION

For the foregoing reasons, and for the reasons previously stated, the petition should be granted.

Respectfully submitted,

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